IN THE

SUPREME COURT OF THE UNITED STATES

OCTOBER TERM, 1963

No. 77

HAROLD A. BOIRE, REGIONAL DIRECTOR, TWELFTH REGION, NATIONAL LABOR RELATIONS BOARD,
Petitioner,

vs.

THE GREYHOUND CORPORATION,
Respondent.

ON WRIT OF CERTIORARI TO THE UNITED STATES COURT OF APPEALS FOR THE FIFTH CIRCUIT

BRIEF OF FLOORS, INC., AS AMICUS CURIAE

ALEXANDER E. WILSON, JR.
615 Rhodes-Haverty Building
Atlanta, Georgia
Counsel for Floors, Inc.

WILSON, BRANCH, BARWICK AND VANDIVER
615 Rhodes-Haverty Building
Atlanta, Georgia
Of Counsel.

R. L. MEREDITH, INC., 1108 Oak Street, Kansas City 6, Mo., HArrison, 1-2080

INDEX

Table of Citations

CASES—

IN THE

SUPREME COURT OF THE UNITED STATES

OCTOBER TERM, 1963.

No. 77

HAROLD A. BOIRE, REGIONAL DIRECTOR, TWELFTH REGION, NATIONAL LABOR RELATIONS BOARD,
Petitioner,

vs.

THE GREYHOUND CORPORATION,
Respondent.

ON WRIT OF CERTIORARI TO THE UNITED STATES COURT OF APPEALS FOR THE FIFTH CIRCUIT

BRIEF OF FLOORS, INC., AS AMICUS CURIAE

I. INTRODUCTORY STATEMENT

A. Consent of Parties to Filing of Amicus Curiae Brief

Pursuant to Rule 42(2) of the Rules of the Supreme Court, Floors, Inc. (hereinafter referred to as "Floors"), sought consent of the parties to this case to the filing by

Floors of an *amicus curiae* brief. Such consent of the parties was received by letter of May 6, 1963, from the Solicitor General, as counsel for Petitioner; and by letter of May 7, 1963, from counsel for Respondent. These letters of consent have heretofore been filed with the Clerk of the Supreme Court.

B. Statement of the Case

The case at bar is the culmination of a proceeding instituted on April 17, 1961, in which Amalgamated Association of Street, Electric Railway and Motor Coach Employees of America, AFL-CIO (hereinafter referred to as "Amalgamated"), filed a petition (TR. 65)[1] with the National Labor Relations Board (hereinafter referred to as the "Board") seeking to represent for purposes of collective bargaining certain employees of Floors who were then working in Greyhound bus terminals in Miami, Tampa, St. Petersburg, and Jacksonville, Florida. On May 25, 1961, Amalgamated filed an amended petition (TR. 66) naming Southeastern Greyhound Lines (hereinafter referred to as "Greyhound") and Floors as co-employers of the employees involved.

On May 3, 1962, the Board issued a Decision and Direction of Election (TR. 67) finding Floors and Greyhound to be co-employers of the employees in the unit petitioned for by Amalgamated. On May 23, 1962, Greyhound filed suit in the United States District Court for the Southern District of Florida seeking to enjoin the election ordered by the Board. On June 12, 1962, the District Court permanently enjoined the Regional Director from holding the election. The District Court's Opinion (TR. 52-59) will be discussed in detail below. Upon appeal, the Court

1. References to the Transcript of Record are designated as "TR."

of Appeals for the Fifth Circuit affirmed the decision of this District Court (TR. 71), and this Court thereafter granted certiorari (TR. 73).

At all stages of this proceeding, Floors has contended that it is the sole employer of all of its employees in the State of Florida, and that a decision to the contrary would act to completely deprive Floors of the right to conduct its labor relations and control its employee complement in the manner essential to its type of business. The interest of Floors in the instant proceeding is, therefore, quite clear. It is simply to retain a right which, prior to the decision of the Board, was thought to inhere in every private business—that is, the right to manage its affairs free from interference and control of another private corporation under the mandate of a governmental agency.

C. Scope of This Amicus Curiae Brief

The primary issue in the case at bar is whether or not the District Court erred in enjoining the Board from holding a representation election. This, in turn, involves two sub-issues: first, whether or not a district court has jurisdiction to enjoin a Board election which is ordered illegally by the Board; and, secondly, whether the Board exceeded its statutory powers in directing the election involved in the instant case.

We respectfully submit that the District Court, under the principles enunciated by this Court in *Leedom* v. *Kyne*, 358 U.S. 184, was fully authorized to enjoin the election on the ground that the Board had acted in excess of its statutory powers in directing the election. The reasons for the correctness of the District Court's ruling on the jurisdictional question are set forth fully in Judge Lieb's Opinion (TR. 52) and in Respondent's brief before this

Court. Accordingly, we will not attempt to repeat what was there said concerning the jurisdictional issue.

This *amicus curiae* brief of Floors will be confined to the question of whether or not the Board exceeded its statutory authority in finding Greyhound and Floors to be co-employers of the employees here involved. It is respectfully submitted that the law applicable to the undisputed facts of this case positively demonstrates the correctness of the decisions below in the District Court and Court of Appeals.

II. SUMMARY OF ARGUMENT

Section 8(a)(5) of the Labor-Management Relations Act, 1947, as amended, the section which establishes the duty to bargain collectively on the part of an employer, provides that an employer must bargain collectively with the representatives of *his* employees. The Act imposes no duty on a company to bargain with the representative of employees of another employer.

Prior to 1947, the Board applied an extremely broad interpretation to the term "employee" as used in the Act, even going so far as to hold independent contractors to be "employees" under the Act. Congress expressed its disapproval of this interpretation in its passage of the 1947 Labor-Management Relations Act and in fact amended the statutory definition of "employee" so as to exclude independent contractors therefrom. Since 1947, the Board and Courts have uniformly applied the so-called "right of control" test to determine whether or not certain individuals are employees of a particular employer. Under this test, an "employer" is one which controls the fundamental elements of the employment relationship.

In the case at bar, the Board found that Floors hires, pays, disciplines, transfers, promotes, and discharges the employees here involved. Yet it held Greyhound to be the joint employer of the employees. In so holding, the Board clearly acted in excess of its statutory authority. The Board's decision forces Greyhound to bargain concerning employees over whom it exercises no real control and with whom it has no real concern; the decision deprives Floors of the right to control its labor relations free from Greyhound interference; the decision completely vitiates an undisputedly valid independent contractor relationship. The District Court was eminently correct in enjoining the illegal election ordered by the Board.

III. ARGUMENT

The argument of Floors in support of its position in the case at bar is set forth below. Each of the factors discussed herein points to the inevitable conclusion that the Board acted arbitrarily and wholly in excess of its powers in finding Greyhound and Floors to be co-employers in this case.

A. The Reason Why Amalgamated Named Greyhound As Co-Employer

The original petition for recognition filed by Amalgamated named Floors as the sole employer of its employees working in the Jacksonville, Miami, Tampa, and St. Petersburg Greyhound terminals (TR. 65). This petition was filed on April 17, 1961. At this time, Floors employed a total of 384 employees in Florida, of whom only 63 worked part or full time in Greyhound terminals (TR. 42). For example, in Tampa, only 12 of 26 Floors employees worked in the Tampa Greyhound terminal (TR. 42). The remain-

ing Floors employees worked at the place of business of other Floors customers.

Thus the unit originally sought by Amalgamated consisted of less than all Floors employees in Florida, less than all Floors employees in a given city, and attempted to group together some employees in different cities who had no distinct community of interests. Such a unit could not possibly be deemed appropriate under the Act, since its only conceivable basis would be the extent of union organization. Such a basis is prohibited by Section 9(c)(5) of the National Labor Relations Act, as amended (hereinafter referred to as the "Act").

Apparently realizing the illegality and impracticality of its proposed unit, Amalgamated came up with an amendment to its petition naming Greyhound as a co-employer of the Floors employees at the Greyhound terminals (TR. 66). It is clear that Amalgamated was grasping at straws in an attempt to segregate these 63 employees from the remaining 321 Floors employees in Florida.

This reason for Amalagamated's naming of Greyhound as co employer, by amendment, is extremely relevant to the case at bar. It demonstrates that even Amalgamated did not in truth consider Greyhound as an employer of Floors' employees. The union's motive for naming Greyhound certainly had nothing to do with advancing the statutory rights of employees. Instead, its motive was to evade the statutory directive as to appropriate units for bargaining.

B. The Decision of the Board

While the same evidence was before the Board as was presented to the District Court, the Board failed to elaborate upon or discuss any of the crucial factors which

negate the possibility of Greyhound being a co-employer of the Floors employees. The Board did specifically find, however, that ". . . Floors hires, pays, disciplines, transfers, promotes and discharges . . ." the employees at the Greyhound terminals (TR. 10).

In spite of the above fundamental indicia of employment relationship, the Board proceeded to hold Greyhound to be the joint employer of the employees sought. The Board's conclusion as to "common control" was based solely on the following factors: Greyhound's terminal managers confer with Floors' supervisors in setting up work schedules and in determining the number of employees required to meet the schedules; Floors' supervisors may visit the Greyhound terminals on an irregular basis and "on occasion" may not appear for as much as two days at a time; the employees in the unit sought sometimes receive work instruction from Greyhound terminal officials; and *on one occasion* Greyhound "prompted" the discharge of a porter (TR. 10). Board Member Philip Ray Rodgers dissented from the Board's decision. Mr. Rodgers would have held Floors to be a sole employer and the appropriate unit to consist of all Floors employees in the localities involved.

C. The Decision of the Court Below

The Fifth Circuit Court of Appeals affirmed the decision of the District Court in a *per curiam* opinion in which the Court expressed its agreement with the principles stated in the District Court's Opinion and the decision there reached. An examination of the District Court's Opinion, by Judge Lieb, demonstrates the soundness of his decision.

Judge Lieb first stated the factors of control which were found to belong to Floors—hiring, paying, disciplin-

ing, transferring, promoting, and discharging the employees (TR. 52). The Court then recited the factors relied on by the Board in finding a joint employer relationship (TR. 53). Based on the above facts, Judge Lieb stated:

> "The Court is of the opinion that the findings of the Board, as recited, are, as a matter of law, insufficient to create a joint employer relationship with respect to the employees in said unit; but that, on the contrary, said findings establish as a matter of law that Floors, Inc., is an independent contractor and, for the purposes of collective bargaining, its employees are not the employees of the plaintiff." (TR. 53).

The District Court was fully aware of the limitations of its powers in cases of this nature. Judge Lieb stated the test of his authority as follows:

> "Whether or not this Court is authorized to intervene in a representation proceeding depends ultimately on the facts presented to it; and if it appears that the Board exceeded its delegated powers, either by acting contrary to a mandatory prohibition of the Act (see *Leedom* v. *Kyne, supra*) or by acting clearly contrary to the over-all spirit of the Act and the manifested intention of Congress (see *Empresa Hondurena de Vapores* v. *McLeod, supra*), then this Court cannot fail to exercise its equity powers to prevent a wrong." (TR. 55).

Based on the facts *as found by the Board*, the District Court concluded that ". . . the Board has attempted to act in excess of its delegated power, particularly in view of the legislative history of the portion of the Taft-Hartley Act of 1947, which amended the definition of the word 'employee' so as to expressly exclude 'independent contractors.'"

It is clear that the District Court's decision enjoining the election was based on the holding that the Board's de-

cision *on its face* showed that the Board had acted in excess of its statutory authority. The basic facts found by the Board were elaborated upon in affidavits presented to the District Court. These additional facts are mentioned in the Court's Opinion (TR. 54) and certainly serve to strengthen its decision. However, the Court's decision is based on the facts as found by the Board. The Court concluded that as a matter of law those facts were insufficient to create a joint employer relationship.

D. The Test of Employer-Employee Relationship

In the briefs of Petitioner and of Amalgamated, it is contended that the Board acted reasonably in finding Greyhound and Floors to be co-employers. Yet nowhere in those briefs is there set forth any statutory authority for such decision. The apparent contention of Petitioner and Amalgamated is that the Board is entitled under Section 9 of the Act to make a conclusive determination as to the employer-employee relationship, and that such determination cannot be upset by the judiciary regardless of its arbitrariness or the fact that no statutory authority exists for such determination. This contention was rejected by the District Court and the Court of Appeals for the obvious reason that no administrative agency is empowered to completely ignore the statutory source of its authority in making a decision. This is precisely what the Board did in the instant case.

> Section 2(3) of the Act provides in pertinent part: "The term 'employee' shall include any employee, and shall not be limited to the employees of a particular employer, unless the Act explicitly states otherwise, . . . but shall not include . . . any individual having the status of an independent contractor . . ."

Section 8(a)(5) of the Act, relating to the duty to bargain collectively, provides as follows:

"It shall be an unfair labor practice for an employer . . . to refuse to bargain collectively with the representatives of *his employees*, subject to the provisions of section 9(a)." (Emphasis added.)

Section 8(a)(5) of the Act establishes a duty to bargain on the part of an employer with the representatives of *his* employees. A refusal to bargain must be directed against one's *own* employees for there to be a violation of the Act. *Operating Engineers* v. *N.L.R.B.*, 266 F.2d 905 (C.A. D.C., 1959), cert. den. 361 U.S. 834.

The question before the Board in the case at bar was as follows: who had the primary right of control over matters fundamental to the employment relationship? The Labor Management Relations Act, 1947, as amended, as is demonstrated by judicial interpretation and legislative history, limits the Board to this determination. Of the many factors of control which make up the "primary right of control," the ones most frequently given effect by the Board and courts are the following: right to hire, discharge and discipline; right to pay and control wages; right to fix fringe benefits; day-to-day supervision; payment of workmen's compensation insurance, federal and state unemployment insurance and social security; ownership of premises upon which work is performed; ownership of equipment used by employees; and right to control hours of work. The facts of the case at bar add one other control factor which is of highest importance—the right to rotate employees from one customer to another.

Prior to the 1947 Taft-Hartley amendment to the Act, the Board had grossly expanded the definition of "employee" to the point where even an independent contractor was considered an "employee" under the Act. The legislative history of the 1947 amendment demonstrates the

express disapproval by Congress of the Board's broad interpretation of this term.

> "But in the case of *National Labor Relations Board* v. *Hearst Publications, Inc.*, 322 U.S. 111, 64 S. Ct. 851, 88 L. Ed. 1170 (1944), the Board expanded the definition of the term 'employee' beyond anything that it ever had included before, and the Supreme Court, relying upon the theoretic 'expertness' of the Board, upheld the Board. It must be presumed that when Congress passed the Labor Act, it intended words it used to have the meanings that they had when Congress passed the Act, not new meanings that, 9 years later, the Labor Board might think up." H. Rep. No. 245, 80th Cong., 1st Sess., 18 (1947).

Since the passage of the Taft-Hartley amendment, the Board and courts have given effect to the legislative intent there expressed and have rejected the *Hearst Publications* approach.

In determining the issue of employer-employee relationship, the Board and the courts have uniformly applied the so-called "right of control" test. This is not, of course, the strict common law control test. It is a test which has been worked out by the Board and approved by the courts as a just formula for furthering the purpose of the Act. The "right of control" test was clearly stated by the Board in the case of *Duane's Miami Corp.*, 119 N.L.R.B., 1331 (1958), as follows:

> ". . . the question as to whether the lessor or the lessee is the employer of the leased department employees in this type of case is determined by which of the two has the primary right of control over matters fundamental to the employment relationship."

This Court recognized the correctness of the "right of control" test in the case of *N.L.R.B.* v. *Denver Building*

and Construction Trades Council, 341 U.S. 675 (1951). It was there stated by Justice Burton:

> "We agree with the Board also in its conclusion that the fact that the contractor and subcontractor were engaged on the same construction project, and that the contractor had some supervision over the subcontractor's work, did not eliminate the status of each as an independent contractor or make the employees of one the employees of the other. The business relationship between independent contractors is too well established in the law to be overridden without clear language doing so. The Board found that the relationship between Doose & Linter and Gould & Prusner, was one of 'doing business' and we find no adequate reason for upsetting that conclusion."

The decision of the Court below in holding as a matter of law that Greyhound is not the employer of the Floors employees is completely in accord with decisions of other circuit courts on the question of employer-employee relationship. Those courts have uniformly applied the "right of control" test to such situations and have arrived at the same conclusion as was reached by the Court below in the case at bar.

In the case of *N.L.R.B.* v. *Norma Mining Corp. et al.*, 206 F.2d 38 (C.A. 4, 1953), the Board had found two separate corporate entities to be joint employers of certain employees of one of the companies. Because of factors very similar to those present in the case at bar, the Fourth Circuit Court found that the relationship between the two companies was consistent with a *bona fide* independent contractor relationship. The Court rejected the Board's findings as to the joint employer status.

In the case of *N.L.R.B.* v. *Carroll*, 120 F.2d 457 (C.A. 1, 1941), the Respondent engaged in interstate transportation of mail by truck pursuant to a contract with the United

States embodying no restrictions on the freedom of the Respondent to employ whomsoever he chose, other than general limitations and provisions that the postmaster might require the suspension of a driver from duty for inefficiency or other serious delinquency. The First Circuit Court held that Carroll *was an independent contractor* and *the truck drivers hired by him were his employees* and not the employees of the United States. At page 458, the Court cites numerous decisions in support of its conclusion.

The Eighth Circuit Court has also arrived at the same conclusion under similar situations. In the case of *N.L.R.B.* v. *New Madrid Manufacturing Company et al.*, 215 F.2d 908 (C.A. 8, 1954), the Court discussed the requirements necessary to the creation of a co-employer relationship:

> "The sole transaction therefore first must be approached in relation to such legal realities as its terms and provisions ostensibly have created. And, unless those terms and provisions, either expressly, or as a matter of reasonable implication, can be said to have given New Madrid *a right or power of control over Jones' prerogative of management in general, or over his labor relations in particular,* there is no basis on the contract itself to brand Jones and New Madrid as having created the status of co-employership in respect to the Portageville plant." (Emphasis added).

The above cases have each held, in effect, that the Board cannot arbitrarily find a joint employer status without statutory authorization for such finding. The courts have uniformly sustained a finding of co-employership only where the "right of control" test, correctly applied, has shown it to exist. Where the right of control is not in both parties, the Board's finding of joint employer status has been rejected. This is the situation in the case at bar.

The "right of control" test was recently applied by the Eighth Circuit Court of Appeals in the case of *Site Oil Company of Missouri* v. *N.L.R.B.*, _____ F.2d _____, 53 LRRM 2604 (C.A. 8, 1963). In the *Site Oil Company* case, *supra*, the owner of a service station was accused by the Board of refusing to bargain with employees of an independent contractor to whom the owner had leased the service station operations. The Eighth Circuit refused enforcement of the Board's decision. The Court, by Judge Sanborn, stated:

> "The legislative history of the Labor Management Relations Act clearly shows that Congress was utterly opposed to having the National Labor Relations Board convert those who had always been understood to be independent contractors into employees."

The Court further concluded:

> "There are many businesses in which management may make a choice as to the manner in which the business shall be conducted, and that choice will be respected. . . . This, in our opinion, is true of the business in which Site is engaged. It may operate one of its filling stations itself by its own employees or it may lease the station to an independent contractor to operate."

The Third Circuit Court of Appeals has also very recently recognized the validity of the "right of control" test for establishing the employment relationship. *N.L.R.B.* v. *Howard Johnson Co.*, 317 F.2d 1 (C.A. 3, 1963).

The arbitrary unreasonableness of the Board's decision in the case at bar is perhaps best illustrated by comparing this decision with the Board's decision in the recent case of *Charlotte Union Bus Station*, 135 N.L.R.B. No. 23 (1962), which was decided very shortly before the Board's decision in the instant case. The *Charlotte Union* case involved a

janitorial service company which was under contract to perform its services for a bus station, a situation identical to the case at bar. In its decision, the Board held that the bus station and the service company were *not* joint employers. The control factors upon which its decision was based were identical to those in the instant case. Yet, the Board applied the right of control test and arrived at a directly opposite decision from the instant case.

E. The Control Test Applied to the Case at Bar

The Board's decision in the case at bar shows on its face that Floors possesses the sole right to control the essential elements of the employment relationship between it and the employees here involved. In order to gain a complete understanding of the reason for this control, it is necessary that this Court understand the nature of Floors' business.

(1) The Business of Floors

In the briefs of Petitioner and Amalgamated, the nature of the business of Floors is completely ignored. The argument of Amalgamated appears calculated to have this Court erroneously believe that Floors is a company formed for the sole purpose of permitting Greyhound to enter into a sham contract by which Greyhound could evade the responsibility for the labor relations of janitorial and service employees. This argument is grossly misleading and fails to do justice to the facts of this case.

Floors, Inc., of Florida is a Florida corporation and a wholly owned subsidiary of Floors, Inc., a Georgia corporation headquartered in Atlanta, Georgia. Floors is engaged in the business of furnishing cleanup, building maintenance and other allied services. It furnishes these services to varied customers throughout Florida, one of which is Grey-

hound. Floors employs a total of 384 persons in the State of Florida. Of these 384 employees, only 63 work part or full-time in Greyhound Terminals. Floors contracts to perform services for its customers for a predetermined price. Floors agrees to provide its customers with a certain number of man-hours of work per week to perform the work contracted for by the customer. All Floors employees are under the immediate supervision of some one of many Floors' supervisors in Florida.

Greyhound has absolutely no ownership interest in Floors. Nor is there any common control of management of labor policy. This is obviously the case, since only 16% of Floors' employees in Florida were, at the time of the Board hearing, working under Floors' contracts with Greyhound.

(2) The Control of Floors over Its Employees

The business of Floors is discussed above. By virtue of the nature of its business, Floors possesses one factor of control over its employees which, we submit, dictates the conclusion that Floors is the sole employer of its employees working at Greyhound terminals. This control factor is the right to "rotate" Floors employees from one customer to another. Simply stated, this is the right, when more man-hours are needed at one customer's place of business, to take an employee who is working on another job and place him on the job which requires more man-hours. It can readily be seen that this is not only a "right" which Floors possesses; it is essential to the carrying out of its business purpose. The crux of Floors' existence is the ability to provide a specialized service to its customers when and as needed. To adequately perform this specialized service, Floors must retain the right to at any given time transfer an employee from one job to another job

where he is more needed. The Board's decision in the instant case effectively destroys this essential element of the business of Floors.

Of course, Floors does not exercise its "right of rotation" indiscriminately, since the longer any employee works on a particular job, the more skilled and efficient he becomes at performing that job. For this reason, employees are rotated only when necessary. But the necessity does arise, and when it does Floors must be able to act to meet the occasion. The record before the Board contained two instances in which Floors had used employees working at Tampa Greyhound on another job. Since Tampa is a very small part of Floors' operations, it is a reasonable assumption that the rate of rotation in other cities, such as Miami and Jacksonville, would be greater than that in Tampa. In fact, the Board record contains instances of transfer from one job to another in Miami and Jacksonville.

Although the record of the Board hearing was not before the Court below, and is not officially before this Court, the *amicus curiae* brief of Amalgamated contains many citations to that record. Nowhere in Amalgamated's brief, however, is there mention of the right of "rotation" or transfer discussed above, in spite of the obvious fact that this is one of the most important indicia of employer status in the case at bar, and in spite of the fact that the Board found specifically that Floors does transfer the employees (TR. 10).

The above discussion of the right of transfer from one customer to another leads into a consideration of another important aspect of the case at bar. The Board found, quite properly, that Floors hires, disciplines, promotes, transfers, and discharges the employees at the Greyhound Terminal (TR. 10). This points up the fact that customers of Floors, such as Greyhound, do not concern themselves

with the particular employees working on the job, but only with the performance of the contract by Floors. That is to say, Floors could have different ones of its employees working on the Greyhound job every day. Greyhound could not care less which Floors employees were on the job as long as the work which Floors was supposed to perform was performed. Greyhound has no interest whatsoever in the individual Floors employee.

The record of the Board hearing was clear, and the Board found in accordance therewith, that Floors hires and discharges its employees. Yet the Board placed undue emphasis on *one* occasion on which Greyhound requested that a Floors employee be removed from the Greyhound job. Floors complied with the request. But even on that one isolated occasion, Greyhound did not effect a discharge of the employee. Only Floors has the ultimate decision to make as to whether to discharge the employee or to transfer him to another Floors job. Greyhound would have nothing to do with this decision.

Only the essential control factors were mentioned by the Board in its Decision and Order. Many others are present in the case at bar. Floors submits that the Board's decision shows on its face that the Board acted in excess of its authority in finding an employer-employee relationship between Greyhound and the Floors employees. However, since Amalgamated has chosen in its brief to refer to various portions of the record of the Board hearing, Floors will also refer to that record in order to point out the control factors which completely negate the conclusion reached by the Board.[2]

In line with Floors' right and duty to hire, discipline, and discharge its own employees is the fact that Floors

2. References to the transcript of testimony before the Board are designated as "(RB.)".

also trains the employees for the particular job to which they are assigned. At the Board hearing, the Floors supervisor in Tampa testified (RB. 173) as to the procedure for training new Floors employees. If the new man is put on a day shift, the supervisor himself gives the training instructions. If the new employee is put on a night shift, the supervisor instructs an older porter to train the new man. Greyhound has absolutely nothing to do with the training of new employees (RB. 173).

As the Board correctly found, the wages of these employees are paid by Floors. There is abundant testimony in the Board record that the pay checks are mailed from Floors' main office in Atlanta to Floors' supervisor in each city (RB. 159, 247). In Tampa, the checks are handed by the supervisor to the employees (RB. 159, 212). He mails the St. Petersburg employees' pay checks to St. Petersburg for the employees' convenience (RB. 159). In Miami the checks are either distributed to Floors' employees by the Floors supervisor there, or left by him for employees to pick up (RB. 228-229). Floors also handles the withholding of income taxes of its employees (RB. 186).

With respect to who actually controls the amount of the wages paid these employees, the contract between Floors and Greyhound, as stated above, is determined on a man-hour basis. Therefore, Greyhound quite naturally has some concern over the wages paid the Floors employees. Such concern is essential in order to have some control over the cost factor in the cost-plus contract, which is merely sound business practice. Accordingly, there is testimony in the record to the effect that Floors could not increase the labor cost of the contract by 25 percent without the approval of Greyhound (RB. 253). In spite of this basic economic fact, Floors still makes the initial determination as to the pay which an employee shall receive. Strong evi-

dence of this is found in the fact that all janitors and maids employed by Floors in the Tampa area, working on the premises of various Floors customers, receive the same wage rate (RB. 172, 204). This would certainly not be true if the wage rate were determined by each customer. Further evidence of Floors' control over wages is found in the matter of overtime pay. The agreement between Floors and Greyhound provides that Greyhound will not be charged for overtime wages unless approved by Greyhound (RB. 54). However, Floors can work employees any time it desires with or without approval of Greyhound. The lack of Greyhound approval would only mean that Floors would have to absorb the cost of the overtime payments (RB. 54). This control over overtime wages is not an abstract right possessed by Floors; it has actually been exercised, and *Floors has in fact absorbed the overtime costs* (RB. 175). From this fact, it can be seen that Greyhound controls only the amount it pays to Floors; it does *not* control the amount Floors pays to Floors' employees. The statement to the contrary contained in Amalgamated's brief (p. 16) is erroneous.

Floors also sets the fringe benefits of its employees. The employees of Floors throughout the Tampa area receive the same benefits and working conditions (RB. 206). It is evident from the Board record that as long as Floors provides Greyhound with the number of man-hours contracted for, Greyhound is totally unconcerned with the matter of vacations, holidays, etc. Moreover, Floors pays workmen's compensation insurance, social security, and unemployment compensation on its employees (RB. 186). The payments of these benefits are certainly acts of an employer in relation to its own employees.

The question of supervision is naturally of great importance in determining who is the employer of certain

employees. In this connection, it was stipulated at the Board hearing (RB. 281) that the testimony of the Greyhound terminal managers at Jacksonville and St. Petersburg would be substantially the same on the question of control as the testimony in the record of the terminal managers at Tampa and Miami. The only Floors supervisor who could be present at the Board hearing was the supervisor of Floors' employees in Tampa and St. Petersburg. Since the contract between Floors and Greyhound is similar in all four cities, in respect to supervision provisions, it can be presumed that the supervision situation in each city is substantially the same.

In an attempt to show a lack of control by Floors supervisors at the Board hearing, Amalgamated called as a witness one William Warren, Floors' employee at the Tampa Greyhound terminal. On direct examination, Warren could name only two instances since Greyhound and Floors entered their contract that the Greyhound Terminal Manager has requested that he perform a certain job (RB. 210, 211). On cross-examination, Warren stated that he not only looked to the Floors supervisor for instructions but considered that person to be his boss (RB. 213). On further cross-examination, Warren testified that he would ask the Floors supervisor, and not the Greyhound Terminal Manager, for permission to get off work, and that in fact he went to the Floors supervisor to request permission to attend the Board hearing (RB. 213, 214). Warren also testified that after Floors and Greyhound made their contract, he applied to the Floors supervisor for a job (RB. 214, 215). Warren testified on re-direct examination that Mr. Rhoden, Greyhound Manager, had once asked a Floors employee to work overtime on a job left vacant by the absence of another Floors employee (RB. 216), but on re-cross-examination, Warren further stated that Mr. Rhoden

had called the Floors supervisor at St. Petersburg before taking that action (RB. 216, 217). The evidence presented by William Warren supports the position of Floors that it is the employer of these employees.

Floors, by its contract with Greyhound (TR. 16-34), agreed to furnish supervision over its employees working at the Greyhound terminals. This contractual provision has been complied with by Floors. Amalgamated and Petitioner contend that the actual supervising of these employees is performed by Greyhound. The overwhelming weight of the evidence in the Board record, and particularly the testimony of the Tampa Floors supervisor, positively refutes that contention. Floors agreed by a contract to do a job for Greyhound. The two parties initially determined what type of work had to be done, and this necessarily included instructions to Floors as to what was expected of Floors' employees. But this is as far as Greyhound's instructions went. Greyhound representatives do not supervise or instruct Floors' employees on the job, except in the rare case where an emergency necessitates such instruction (RB. 89). The testimony of all Greyhound officials who testified before the Board (RB. 34, 35; 104, 105; 278) is to the effect that their contact with Floors employees is carried on through the Floors supervisor, and that it is the supervisor who gives orders to the porters, janitors and maids. The above testimony was directly supported by the introduction into evidence of a memorandum from the Greyhound Superintendent in Tampa to Greyhound supervisors in the Tampa area (RB. 48-50) stating that Greyhound supervisors were to give no instructions to Floors' employees, but were to go to the Floors supervisor concerning any complaints about Floors' employees' work. This memorandum was dated September 29, 1958, which illustrates the fact that the situation

as to supervisory control existing at the time of the hearing had been in existence for at least three years.

The Tampa Floors supervisor testified to the following facts relating to the question of day-to-day supervision. The only instructions which the Tampa supervisor receives are from his Floors superiors, namely, the home office in Atlanta or from C. L. Stewart, who is in charge of the Floors operation in Florida (RB. 153). The Tampa Greyhound terminal manager does ask the Floors supervisor to do certain things (RB. 148). If the Floors man decides that the request is proper and within the contract between Floors and Greyhound, he then instructs the Floors employees to perform the requested work (RB. 150). In other words, the Floors supervisor, in carrying out the request of the Greyhound terminal manager, is simply performing Floors' part of the Greyhound contract. If the requested work is not covered by the contract, he can refuse to do it. Any unresolved question would be determined by Floors and Greyhound management. The regular Floors supervisor testified that when he goes on vacation, another Floors supervisor replaces him during that period (RB. 189). It is clear that Floors carries out the provision in its contract with Greyhound by which Floors agrees to supervise Floors employees on the Greyhound premises. For this reason, the Floors supervisor instructs his employees to comply with requests made by Greyhound personnel in his absence, and to then complain to him (RB. 184). This does not mean that Greyhound personnel can supervise Floors employees. It simply means that, to avoid friction, the Floors supervisor would rather take the employees' grievances to Greyhound for complaint himself (RB. 184, 185). It is important to note that it is only because their Floors supervisor ordered them to do so that the Floors employees occasionally take instructions from Greyhound.

Day-to-day supervision is an important part of the employer-employee relationship. The record in this case fails completely to show any such control or supervision exercised by Greyhound over the Floors employees. The only conclusion which can be reached from the record is that the Greyhound control asserted by Amalgamated does not exist. At most, the Board record shows that Greyhound employees can give Floors' employees occasional routine instructions as to certain details of their work. The direct day-to-day supervision over matters which are important to the employment relationship is performed by the Floors supervisor.

Another control factor which is pertinent to this case is where and with what materials these employees work. Of course, they work on the premises of Greyhound, since the nature of Floors' business requires its employees to work at the place of business of Floors' customers. However, although these employees are working on Greyhound property, the supplies and equipment (brooms, mops, wax, etc.) which they use on the job are owned by Floors and furnished the employees by Floors (RB. 186, 247).

The question of who controls the employees' hours of work is relevant to this case. It is important to remember here that Floors has contracted to do a job for Greyhound. At the Greyhound terminals in Miami, Tampa, Jacksonville and St. Petersburg, Floors performs the portering and janitorial work. It is clear in the Board record that as long as this work is done properly, Greyhound does not concern itself with which Floors employees work, when, or how many hours. In the words of the Greyhound terminal manager, ". . . just as long as everything is handled properly we don't care." (RB. 53). Greyhound's only concern is that the bus schedules be covered (RB. 53). Grey-

hound posts the bus schedules in the terminal, and it is left to the Floors supervisor to see that the schedule is covered by Floors porters (RB. 161). The work hours of Floors' employees are not set up to coincide in any way with the hours of Greyhound employees (RB. 167, 168). Neither does the Floors employees' lunch break have any relation to that of the Greyhound employees (RB. 171). The Board record shows clearly that Greyhound has nothing to do with the hours worked by any particular Floors employee.

In its Decision and Order, the Board found that "... Floors hires, pays, disciplines, transfers, promotes and discharges the porters, janitors and maids." In addition to the above control factors pointed out by the Board, the record of the Board hearing clearly shows that Floors trains all new employees; determines wage rates and pays its employees; handles withholding taxes on its employees; controls fringe benefits and pays workmen's compensation, unemployment insurance and social security on its employees; provides supervision over the day-to-day activities of its employees; owns and furnishes all supplies and equipment used by the employees; and, finally and of crucial importance, Floors retains and exercises the right to use its employees on whatever job it desires at any time.

There is clearly no authority in the statute for the Board to decide that the employees of Floors are also employees of Greyhound. Greyhound is simply not an employer, in any sense, of the Floors employees. It is extremely difficult to see how at this late date the Board can attempt to reinstate the *Hearst Publications* interpretation of "employee" directly in the face of Congressional criticism and legislative reversal of the *Hearst* interpretation. The Court below was eminently correct in enjoining the Board from acting in excess of its statutory authority.

F. The Effect of the Board's Decision

A consideration of the effect which the decision of the Board, if allowed to stand, would have on the business of Floors is relevant to this Court's decision in the case at bar. It also serves to demonstrate the unreasonableness of the Board's decision and the lack of statutory approval for such decision.

The agreements between Floors and Greyhound covering the various Florida Greyhound terminals are in the record before this Court. There can be no doubt that the agreements create a legitimate independent contractor relationship. The sole purpose of Floors' corporate existence is to provide janitorial and other services of a like nature to its customers. Greyhound is only one of many customers serviced by Floors.

The growth of companies similar to Floors has been phenomenal in the past decade. They serve a highly beneficial purpose to the American economy, as is illustrated by the Floors-Greyhound situation. Greyhound is primarily in the business of bus transportation. The selling of bus tickets, the maintenance of its buses, and the driving of its buses to destination are the primary concerns of Greyhound. The janitorial and portering services at Greyhound terminals, while necessary, are not directly a part of Greyhound's business objective. For that reason, Greyhound contracts out its janitorial and portering work to an independent contractor who can provide specialized and efficient service in that area. This relieves Greyhound of the expense and burden of managing and controlling the janitorial and portering services at its terminals.

At the same time, the expense and burden of such services are completely assumed by the independent con-

tractor. The expense is less because of the degree of specialization with which the contractor performs the services. The burden is less because the contractor can concentrate on those particular services. It does not have to worry about the operation of a large bus transportation company. The legitimate benefit afforded by companies such as Floors is obvious.

What is the effect of the Board's decision in the case at bar on the situation described above? Greyhound is held to be a joint employer of Floors' employees. It is no longer relieved of the burden of managing the janitorial services at its terminals. In fact, the burden is multiplied. Now, it cannot even act with respect to those services as it wishes, since it must act jointly with another, wholly independent company. By the same token, Floors, which has hired, fired, disciplined, paid, transferred and controlled its employees at the Greyhound terminal, now finds that it is no longer their employer. Floors no longer has control over their employment relationship, since it must consult Greyhound whenever it desires to act on a matter of labor relations. The valid independent contractor arrangement is vitiated without cause by administrative fiat.

The arbitrary creation by the Board of a joint employer status will inevitably cause companies such as Floors to be eliminated. Their beneficial purpose will simply have been destroyed. Moreover, the Board's decision does not purport to favor the interests of the particular employees involved in this case. No persuasive reason has been, or could be, given for the baseless finding that Greyhound and Floors are co-employers of the Floors employees.

IV. CONCLUSION

It is respectfully submitted that the Board's decision in the case at bar went far beyond the statutory authority of the Board to make determinations as to the appropriateness of a unit of employees. The District Court had jurisdiction, and indeed an obligation, to enjoin the election illegally ordered by the Board.

Accordingly, the decision of the Court of Appeals for the Fifth Circuit affirming the District Court should be affirmed.

Respectfully submitted,

ALEXANDER E. WILSON, JR.
Counsel for Floors, Inc., Amicus Curiae.

WILSON, BRANCH, BARWICK AND VANDIVER
615 Rhodes-Haverty Building
Atlanta 3, Georgia
Of Counsel.